UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIGNITY HEALTH d/b/a MERCY GILBERT MEDICAL CENTER,

Respondent,

and

Nos. **28-CA-229160**
28-CA-238137

SERVICE EMPLOYEES INTERNATIONAL UNION-UNITED HEALTHCARE WORKERS WEST,

Charging Party.

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST'S ANSWERING BRIEF IN RESPONSE TO DIGNITY HEALTH DBA MERCY GILBERT MEDICAL CENTER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

BRUCE A. HARLAND, Bar No. 230477
WILLIAM T. HANLEY, Bar No. 327126
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: bharland@unioncounsel.net
whanley@unioncounsel.net

Attorneys for Charging Party,
SERVICE EMPLOYEES INTERNATIONAL
UNION-UNITED HEALTHCARE WORKERS WEST

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I. INTRODUCTION

On October 11, 2018, Service Employees International Union, United Healthcare Workers-West (the "Union") filed an unfair labor practice charge against Dignity Health d/b/a Mercy Gilbert Medical Center (the "Employer").[1] The Union filed an amended charge on January 17, 2019, and a second related charge on March 19, 2019.[2] The charges arose out of the Union's attempt to organize employees in the Employer's Emergency Department ("ED"), and alleged that the Employer interfered with this organizing campaign and violated Section 8(a)(1) of the National Labor Relations Act (the "Act") by coercively interrogating employees, engaging in surveillance and creating the impression of surveillance, and directing employees not to discuss working conditions among themselves, but instead come to management with their concerns. The charges also alleged that the Employer violated Section 8(a)(1), (3) and (4) of the Act by assigning an employee more onerous duties because the employee engaged in union activities and/or because said employee cooperated with an investigation carried out by the National Labor Relations Board ("NLRB" or the "Board"). In response to the charges, Region 28 of the NLRB issued a consolidated complaint, and the Employer filed a timely answer.

On July 23-24, 2019, the parties participated in a trial before Administrative Law Judge ("ALJ") Ariel L. Sotolongo in Phoenix, Arizona. The ALJ issued his decision on March 19, 2020, sustaining certain allegations in the complaint, and dismissing others. More specifically, the ALJ found that the Employer violated Section 8(a)(1) of the Act when ED Director Dawn Kimball identified ED Tech John Paul "J.P." Placencio as a worker who had been contacted by the Union, without revealing how she learned of this contact, thus creating the impression of surveillance. *See* ALJ's Decision ("ALJD") at p. 13: lines 5-35. The ALJ also found that the Employer violated Section 8(a)(1) when manager Joshua Harrison interrogated Mr. Placencio about his Union activities. ALJD at 14:4-30. By contrast, the ALJ failed to find violations of the Act based on allegations that agents of the Employer surveilled workers while they distributed

[1] Case 28–CA–229160.

[2] Case 28–CA–238137.

Union leaflets; that Ms. Kimball directed Mr. Placencio not to discuss working conditions with his coworkers; and that the Employer retaliated against Mr. Placencio by assigning him more onerous work assignments. ALJD at 14-18.

On April 15, 2020, the Employer filed exceptions to the ALJ's decision. The Employer excepted to the ALJ's finding that Ms. Kimball identified Mr. Placencio as a supporter of the Union at a staff meeting, and further alleged that even if this incident did occur, it did not create the impression of unlawful surveillance as the ALJ concluded. The Employer also excepted to the ALJ's finding that Mr. Harrison unlawfully interrogated Mr. Placencio when he repeatedly asked whether Mr. Placencio went by the name "J.P.", and whether Mr. Placencio was aware of the Union's organizing campaign. On April 16, 2020, the General Counsel of the NLRB filed its exceptions to the ALJ's decision. The General Counsel excepted to the ALJ's finding that the Employer's agents observing workers distributing Union leaflets did not constitute unlawful surveillance. The General Counsel also excepted to the ALJ's conclusion that Ms. Kimball's direction to Mr. Placencio not to discuss workplace complaints with his coworkers, but to instead come directly to management, did not constitute unlawful interference with protected activity, unlawful surveillance, and/or unlawful interrogation.

II. DISCUSSION

The ALJ's conclusions that the Employer violated Section 8(a)(1) of the Act when Ms. Kimball identified Mr. Placencio as an individual who was in contact with the Union, and when Mr. Harrison repeatedly asked whether Mr. Placencio went by "J.P." and whether he was aware of the Union, are legally sound. Ms. Kimball created the impression that she was monitoring Mr. Placencio's protected activities when she identified him without revealing how she became aware of this information. Similarly, Mr. Harrison improperly interrogated Mr. Placencio about his protected, concerted activities. For these reasons, the Employer's exceptions are not supported in either law or fact, and should be dismissed.

A. THE ALJ CORRECTLY CONCLUDED THAT MS. KIMBALL UNLAWFULLY CREATED THE IMPRESSION OF SURVEILLANCE DURING THE AUGUST 28, 2018 STAFF MEETING

On August 28, 2018, Ms. Kimball and Charge Nurse Ryan Sutton led a pre-shift meeting in the ED. ALJD at 3:18-19. Approximately 10 employees were present. ALJD at 3:19. Mr. Placencio, who attended the meeting, testified that Kimball made several statements related to the Union's organizing campaign: that the Union was passing out flyers to workers at the facility; that the workers had a right to form a union; that her husband was a union member; that the Union was making promises it could not keep; and that the Union "needed dues" because workers in California were not paying theirs in light of a recent Supreme Court decision. ALJD at 3:19-25. According to Mr. Placencio, Ms. Kimball then pointed in his direction and said she knew the Union had contacted him. ALJD at 3:25. Ms. Kimball disputed Mr. Placencio's version of the story. She testified that the meeting was prompted by complaints she received from certain employees that Union organizers had contacted them at home. ALJD at 3:27-28. Ms. Kimball claimed that she informed the meeting attendees of their rights if they did not wish to be contacted at home. ALJD at 3:30. She denied identifying the workers who complained to her, and specifically denied singling out Mr. Placencio, or anyone else, as being involved in the Union's organizing campaign. ALJD at 3:31-32.

In finding that Ms. Kimball's actions during the August 28, 2018 meeting violated the Act by creating the impression of unlawful surveillance, the ALJ credited Mr. Placencio's version of events. The ALJ noted that Mr. Placencio gave a detailed account of the meeting, and included statements in his testimony that might seem friendly to the Employer — i.e., that Ms. Kimball respected the employees' right to engage in union activities. The ALJ also noted that Ms. Kimball never explicitly denied pointing at Placencio, and that the meeting occurred shortly after Ms. Kimball learned that Placencio was involved in the Union's campaign. ALJD at 4:2-8.

As the ALJ cites in his decision, the test of whether an employer has unlawfully created the impression of surveillance is an objective one — that is, whether under all the circumstances an employee could reasonably conclude from the statement or conduct in question that his/her

protected activities had been placed under surveillance. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007), *quoting Flexsteel Industries*, 311 NLRB 257, 257 (1993); *Consolidated Communications of Texas Company*, 366 NLRB No. 172, slip op. at 1 n.1 (2018). Thus, when an employer reveals that it is aware of its employees' protected activities, but fails to identify the source of this information, an unlawful impression of surveillance is created, because the employees could reasonably surmise that the employer has been monitoring their activities. *Conley Trucking*, 349 NLRB 308, 315 (2007). The ALJ relied on this precedent to conclude that when Ms. Kimball identified Mr. Placencio as being in contact with the Union, but failed to disclose how she knew this fact, she unlawfully created the impression that the Employer was monitoring Mr. Placencio's communications with the Union. ALJD at 13:35-36.

The Employer excepted both to the ALJ's factual finding that Ms. Kimball singled out Mr. Placencio at the August 28, 2018 meeting, and the legal conclusion that such conduct would violate the Act. According to the Employer, the ALJ's credibility analysis was flawed, because he did not sufficiently consider that the Employer provided training to managers such as Ms. Kimball about how to "positive communicate" with employees about their rights under the Act; that the Employer provided reminders to managers on this topic after the trainings; and that the Employer actually made such "positive communications" to ED employees prior to the August 28, 2018 meeting. *See* Employer's Brief in Support of Exceptions ("Employer") at p. 6-7. The Employer also noted that Ms. Kimball informed ED employees during the meeting that (1) she supported their right to organize, and (2) that her own husband is a member of a labor union. Employer at p. 7. In the Employer's view, because Ms. Kimball was aware that surveillance was unlawful, and because she personally supported the ED workers' right to organize, it was unlikely that she singled out Mr. Placencio during the meeting.

An ALJ's "reasonable credibility determinations are subject to deference." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). Here, the determination that Mr. Placencio was more credible than Ms. Kimball was not merely reasonable, but the most reasonable conclusion based on the facts available. In coming to this conclusion, the ALJ noted

(1) that Mr. Placencio's account was more detailed than Ms. Kimball's, and included facts that were harmful to the Union's allegation; and (2) that Ms. Kimball failed to explicitly deny pointing at Mr. Placencio. Reliance on these factors is wholly consistent with Board law. *See, e.g.*, *J.J. Cassone Bakery, Inc.*, 350 NLRB 86, 92, n.4 (2007) (Board affirmed ALJ's credibility determination, which was based on the witness's "detailed testimony" and "forthright and detailed" account of an unlawful threat); *Station Casinos, LLC*, 358 NLRB 1556, 1585 (2012) (affirming ALJ decision to credit witness who provided "detailed testimony about the events in dispute"). Indeed, the Employer does not even attempt to engage with the actual reasons why the ALJ credited Mr. Placencio's version of events. Instead, the Employer alleges that Mr. Placencio "fabricated" various allegations included in the complaint, and that the ALJ should therefore have concluded that Mr. Placencio fabricated this allegation. Employer at p. 8. Such conclusory allegations are insufficient to show that the ALJ's conclusion was unreasonable.

The Employer also challenged the ALJ's conclusion that Ms. Kimball's actions, even as alleged in the complaint, constitute a violation of the Act. According to the Employer, it would be more reasonable for attendees of the meeting to believe that Ms. Kimball used lawful means, not surveillance, to discover Mr. Placencio's communication with the Union. To support this assertion, the Employer relies on Ms. Kimball's testimony that during the August 28 meeting, prior to singling out Mr. Placencio, she discussed receiving reports of the Union contacting ED employees at home. "Ms. Kimball testified … that she told staff at the pre-shift meeting she received reports from coworkers, and wanted to share her responses to those coworkers so that all members of the Department could benefit." Employer at p. 9. The Employer thus concludes that "[t]here is no basis … for assuming [Ms. Kimball] knew because of a coercive program of surveillance … the existence of which was not even alleged." Employer at p. 10.

According to the Employer, the ALJ misstates Board law on the subject of unlawful surveillance, and the ALJ's reliance on *Conley Trucking* is therefore misplaced. "The Board does not require as a condition to an employer's factual claims about employee conduct that the speaker must cite her sources to prevent any possible misunderstanding." Employer at p. 10.

The Employer cites *SKD Jonesville Div. L.P.*, for the proposition that "a statement as to what someone has heard could be based on (1) what he had heard from the grapevine or (2) what he had picked up from spying … There is no reason to infer the latter as the source over the former." Employer at p. 10-11. The Employer also alleges that "[e]ven in cases where the identification of a union supporter is both deliberate and explicit, the Board has dismissed similar claims where the speaker did not refer to the specific source of his or her knowledge." Employer at p. 11. In support of this assertion, the Employer cites *The Guard Publishing Co.*, 344 NLRB 1142, 1144 (2005); *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761 (2000); and *BLT Enters. of Sacramento, Inc.*, 345 NLRB 564, 565 (2005). The Employer also relies on *Waste Mgmt. of Ariz., Inc.*, 345 NLRB 1339 (2005); where, after a supervisor stated he was "aware that employees had a union meeting," the Board held that the statement "would not have reasonably implied that he had monitored employees' activities, given the various other ways in which he might have learned of the non-secret meeting." 345 NLRB 1339, 1339 (2005).

Here, it is not the ALJ who misstates Board law, but the Employer. In *SKD Jonesville Div. L.P.*, 340 NLRB 101 (2003) the targeted employee was "openly and actively involved" with a union organizing campaign, making it far more likely that a manager discovered her union activities "through the grapevine," as opposed to through spying. 340 NLRB at 102. Here, on the other hand, Mr. Placencio went to great lengths to hide his involvement with the Union from management, as evidenced by his repeated denials of Union activity to Mr. Harrison on September 27. Similarly, *The Guard Publishing Co.* contains unique facts that are inapplicable here. In that case, the Board found that after an employer sent a letter revealing that certain employees withdrew their union cards, any ambiguity about the source of this knowledge was *clarified in a subsequent letter* revealing that the employees voluntarily shared this information with management. 344 NLRB at 1144. *St. Luke's Episcopal-Presbyterian Hospitals* contains similarly inapposite facts. There, a manager informed an employee that a different supervisor reported her for soliciting union memberships in an outpatient area. 331 NLRB at 761. The employee then approached the other supervisor, who revealed that a certain coworker reported

the solicitation. *Id*. Thus, the facts of *St. Luke's Episcopal-Presbyterian Hospitals*, where management almost immediately revealed how it learned of the employee's solicitation, mirror those of *The Guard Publishing Co.*, and stand in direct contrast to the facts of this case, where Ms. Kimball singled out Mr. Placencio as a Union supporter, but *never* explicitly revealed how she became aware of this support.

Similar to *SKD Jonesville Div. L.P.*, the *Sacramento Recycling & Transfer* case involved open union supporter. Indeed, prior to a supervisor telling this employee "I understand you are one of the guys that were involved in starting the Union," the company had *already learned* of a confrontation between the employee and a coworker "that arose in part from [the employee's] strong support for the Union." 345 NLRB at 565. Again, in the instant case, Mr. Placencio was hiding his involvement with the Union from management, making it far more reasonable that the Employer learned of this involvement through spying, as opposed to lawful means. Finally, the facts of a case such as *Waste Mgmt. of Ariz., Inc.* do not help the Employer's argument. There, during a one-on-one conversation between an employee and a supervisor, the supervisor mentioned that he was aware of a union meeting. 345 NLRB at 1339. The meeting was not held in secret, and the Board notes that there were "various other ways in which [the supervisor] might have learned of the non-secret meeting," aside from surveillance. *Id.* at 1340. Here, on the other hand, any communications between Mr. Placencio and the Union would have been secret, given that Mr. Placencio did not want his status as an organizer to be known. Thus, when Ms. Kimball identified Mr. Placencio as someone who was communicating with the Union, she was divulging secret information that could only have been acquired from a handful of sources, making it far more reasonable for Mr. Placencio to believe he was being surveilled.

According to the Employer, Mr. Placencio "spoke openly at [Union] meetings that were not even allegedly conducted privately or in secret, including one that resulted in a report to Ms. Kimball." Employer at p. 12. Thus, "the fact that Ms. Kimball eventually discovered Mr. Placencio's advocacy was not unusual or even surprising, and would not give anyone, including Mr. Placencio, a reason to assume that improper surveillance was occurring." Employer at p. 12.

To support this claim, the Employer relies on two Board cases: *Clark Equipment Co.*, 278 NLRB 498, 503 (1986) ("Employers are not required to make themselves oblivious to what employees have chosen to make known, and their failure to do so is not coercive."), overruled in part by *Nickles Bakery of Ind., Inc.*, 296 NLRB 927 (1989); and *North Hills Office Services Inc.*, 346 NLRB 1099, 1104 (2006) ("Volunteering information concerning employee's union activities [provided] by other employees … particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.").

Again, the Employer cites to cases with inapposite facts. In *North Hills Office Services Inc.*, the union highlighted two instances where management allegedly created the impression of surveillance. In both examples, however, supervisors were explicit that the information being shared came from fellow employees. Indeed, the General Counsel in *North Hills Office Services, Inc.*, was attempting to argue that "where an employer informs an employee that coworkers are reporting on their union activities, the employer creates an impression of surveillance." 346 NLRB at 1103. Nowhere in the instant case has the Union or the General Counsel argued for such an expansive view of Section 8(a)(1). Indeed, the ALJ was clear in his decision that Ms. Kimball created the impression of surveillance when she identified Mr. Placencio as someone who was contacted by the Union and then *failed to reveal her source* for that claim.

Importantly, Mr. Placencio testified not that Ms. Kimball outed him as a Union supporter, or that she claimed he was attending Union meetings, but that she singled him out as someone the Union had "contacted." Thus, even assuming that Ms. Kimball learned of Mr. Placencio attending a Union gathering prior to the August 28 meeting, she still had no reason to identify him as someone with whom the Union was communicating. Contrast this with *Clark Equipment Co.*, where an employee was openly distributing union leaflets at the plant, and a supervisor later informed the employee that "he had heard about" the leafletting and was "disappointed." 278 NLRB at 503. In *Clark Equipment Co.*, an employee was openly leafletting, and a supervisor admonished him for leafletting. Here, on the other hand, an employee attended a Union meeting, and a supervisor identified him as "being in contact" with the Union. In the latter case, it would

be reasonable to conclude that surveillance occurred. In the former case, because the *specific activities at issue* occurred in the open, such a conclusion would be unreasonable. For this reason, the Employer's reliance on *Clark Equipment Co.* is misplaced.

As stated above, the Employer alleges that because Mr. Placencio "spoke openly at [Union] meetings that were not even allegedly conducted privately or in secret," it would be unreasonable for him to interpret Ms. Kimball's conduct as evidence of surveillance. However, this must be weighed Mr. Placencio's clear desire *not* to be outed as a Union supporter. He declined to confirm Ms. Kimball's accusation that he was communicating with the Union, and he repeatedly denied any knowledge of the Union when Mr. Harrison interrogated him on September 27. Any claim that because Mr. Placencio was supposedly "open" about his support of the Union, it would therefore be unreasonable for him to conclude he was being surveilled, is undercut by his subsequent behavior, which consisted of repeated denials of Union activity.

B. THE ALJ CORRECTLY CONCLUDED THAT MR. HARRISON UNLAWFULLY INTERROGATED MR. PLACENCIO REGARDING HIS UNION SUPPORT AND ACTIVITIES ON SEPTEMBER 27, 2018

On September 27, 2018, Ms. Kimball and Mr. Harrison spoke to several employees while walking through the ED, including Mr. Placencio. ALJD at 4:12-14. According to Mr. Placencio, Mr. Harrison asked if Mr. Placencio had heard anything about the Union. ALJD at 4:19-20. Mr. Placencio answered that all he had heard about the Union came from management emails. ALJD at 4:21-22. Mr. Harrison responded with critical comments about the Union, then asked Mr. Placencio again if he had heard about the Union. ALJD at 4:22-24. Next, Mr. Harrison asked for Mr. Placencio's name, repeatedly attempting to clarify if he went by "J.P." or his full name John Paul. ALJD at 4:27-28. When Mr. Placencio responded that he goes by both names, and repeated that he was not involved with the Union, Mr. Harrison claimed that workers in another department were claiming they were organized by a "J.P." from the ED. ALJD at 4:29-30. Mr. Placencio testified that Mr. Harrison kept asking him if it was "J.P." or "John Paul," and kept repeating that employees in the Respiratory Department had identified a "J.P." as an organizer for the Union. ALJD at 4:30-32.

Ms. Kimball and Mr. Harrison disputed Mr. Placencio's version of events. Ms. Kimball claimed that she shared information about the Employer's merit pay program with Mr. Placencio, and denied that Mr. Harrison asked Mr. Placencio about his involvement with the Union. ALJD at 4:38-44; 5:1-4. For his part, Mr. Harrison testified that he had little recollection of the events of September 27, and that he was not sure who Mr. Placencio was, or the extent of his involvement with the Union. ALJD at 5:6-19. The ALJ found that Mr. Placencio's version of events to be the most credible, concluding that "Mr. Harrison repeatedly questioned [Mr. Placencio] as to whether he was involved in the Union organizing." ALJD at 6:2-4. The ALJ focused on (1) the "detailed, blow-by-blow" nature of Mr. Placencio's testimony, as compared to Mr. Harrison's "befuddled" account of events; (2) Mr. Harrison's failure to specifically deny, or even address, Mr. Placencio's claims; (3) Ms. Kimball's failure to deny that Mr. Harrison engaged in interrogation until she was "coaxed" to do so; and (4) the Employer's failure to publicly deny Mr. Placencio's accusation about the interrogation, even after Mr. Placencio informed his coworkers of the incident via email. ALJD at 6:2-22.

In determining whether an unlawful interrogation has occurred, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act. Relevant factors include the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee's reply to the questioning. *Rossmore House*, 269 NLRB 1176, 1177–78 (1984), *citing Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Here, the ALJ determined that the Employer violated Section 8(a)(1) because "any employee in Mr. Placencio's shoes would have reasonably felt coerced under the circumstances." ALJD at 14:28-30. The ALJ cited several facts to support this conclusion, including that the interrogators were high-level managers; that Mr. Harrison repeatedly asked Mr. Placencio about his involvement with the Union, to the point of "insistent and repetitive pressing"; and that Mr. Placencio falsely denied his involvement, indicating he was worried about the consequences of answering truthfully. ALJD at 14:19-28.

Once again, the Employer excepted to both the Employer's factual and legal findings. According to the Employer,

> [a]lthough both Ms. Kimball and Mr. Harrison forcefully denied any unusual or irregular conduct, or even any questioning of Mr. Placencio whatsoever, the ALJ discounted *both of their versions of the discussion* despite the complete absence of corroboration for any aspect of Mr. Placencio's illogical account. Employer at p. 18.

The Employer disputed the importance of the lack of detail in Mr. Harrison's version of events, and claimed that Mr. Harrison's and Ms. Kimball's failure to deny Mr. Placencio's accusations forcefully and publicly demonstrate "patience, not acquiescence." Employer at p. 18. While conceding that "reasonable credibility determinations are subject to deference,"[3] the Employer still argues that the ALJ "treated conflicting evidence without evenhandedness or a complete examination." Employer at p. 19. The Employer notes in Ms. Kimball and Mr. Harrison's version of events, their conversation with Mr. Placencio was "lawful and devoid of any interrogation or other form of interference." Employer at p. 19.

Here, the ALJ's decision to credit Mr. Placencio's testimony once again easily meets the *Allentown Mack* reasonableness standard. As set out in cases such as *J.J. Cassone Bakery, Inc.* and *Station Casinos, LLC*, cited above, the level of detail in a witness's recollection of events is a perfectly acceptable measure of credibility. Moreover, "general" or "blanket" denials … are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses." *See, e.g.*, *Hospital Management Assoc., Inc.*, 284 NLRB 37, 39 (1987); *Beaird-Poulon Div., Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981); *York Products, Inc. v. NLRB v. NLRB*, 881 F.2d 542 (8th Cir. 1989). Both Ms. Kimball and Mr. Harrison issued this type of "blanket" denial in response to Mr. Placencio's highly detailed accusations. Lastly, the Employer's references to the consistency between Ms. Kimball and Mr. Harrison's testimony, and to the lack of corroborating evidence for Mr. Placencio's testimony, are ultimately irrelevant. The Board has often sided with more confident, detailed accounts — even without corroborating evidence — when faced with less detailed version of events from the opposing side. *See, e.g.*,

[3] *Allentown Mack Sales & Serv., Inc.*, 522 U.S. at 378.

Tri-Maintenance & Contractors, Inc., 235 NLRB 895, 897-98 (1978) (finding a witness credible "despite the lack of corroborating testimony by other employees who were present" because an opposing witness was "unreliable" and "his version of the meetings was unconvincing").

The Employer also excepts to the ALJ's conclusions of law, specifically as to whether the *Rossmore House* test support a finding of unlawful interrogation. The Employer cites the full list of *Rossmore Hours* factors as:

> (1) whether a history of employer hostility and discrimination existed; (2) the identity of the questioner and how high he/she was in the employer's hierarchy; (3) place and method of interrogation, such as a supervisor's office, on the shop floor, or in a formal or informal atmosphere; (4) the nature of the information sought and whether the interrogator appeared to be seeking information on which to base taking action against individual employees; and (5) the truthfulness of the reply. 269 NLRB at 1176.

According to the Employer, most of these factors "militate against a finding of interrogation." Employer at p. 22. The Employer claims that (1) "the history of the Company's communications emphatically did not evidence hostility to Union organizing"; (2) "the questioner involved, Mr. Harrison, was a low-level Manager in a department other than Mr. Harrison's"; and (3) "the discussion that occurred on September 27 was in an open area of the Department at a central activity desk surrounded by other staff." Employer at p. 22. Moreover, the Employer asserts — citing *Trailmobile Trailer LLC*, 343 NLRB 95 (2004) and *Volair Contractors, Inc.*, 341 NLRB 673 (2004) — that asking Mr. Placencio to "self-identify as an advocate" for the Union would not "reasonably have a tendency to interfere with, restrain, or coerce"[4] him in the exercise of his Section 7 rights. Employer at p. 23.

The Employer's *Rossmore House* analysis is flawed. Starting with the second element of the test, Mr. Harrison is in fact a "high-level" manager, as the ALJ concluded, and not a "low-level" manager, as the Employer claims. Mr. Harrison manages an entire department of the hospital; whether Mr. Placencio worked in that specific department is irrelevant. There is still no dispute that Mr. Harrison far outranks Mr. Placencio. Moreover, for purposes of the *Rossmore*

[4] Multi-Ad Servs., 331 NLRB 1226, 1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001).

House test, "the Board's interpretation of statutory supervisor permits no … distinction based on the purported supervisor's rank or status in the employer's administrative hierarchy." *Western States Envelope Co.*, 2010 NLRB LEXIS 79 (N.L.R.B., Mar. 19, 2010).[5] Moving to the fifth *Rossmore House* factor, Mr. Placencio testified that he denied any knowledge of the Union or its attempt to organize the ED, even when repeatedly pressed by Mr. Harrison, despite this being untrue. As the ALJ concluded, Mr. Placencio was nervous that answering truthfully could lead to retaliation, which is strong evidence of coercive interrogation in violation of the Act.

According to the Employer, the fourth *Rossmore House* element — "the nature of the information sought and whether the interrogator appeared to be seeking information on which to base taking action against individual employees" — favors against a finding of unlawful interrogation. Once again, however, the two cases cited by the Employer are factually inapposite. In *Trailmobile Trailer LLC*, 343 NLRB 95 (2004), a supervisor approached a group of employees engaged in union handbilling and made several disparaging comments about the union. 343 NLRB at 95. Importantly, the union *did not* allege that the supervisor's conduct constituted interrogation. *Id*. The union instead argued that the comments "violated Section 8(a)(1) because they were demeaning and conveyed the impression that the employees' union activities were futile." *Id*. The Board was unpersuaded, noting that the Act permits "a significant degree of vituperative speech in the heat of labor relations." Here, *Trailmobile Trailer LLC* cannot support the Employer's assertions because, first and foremost, it is not an interrogation case. Additionally, the case involves a group of employees who were openly engaged in union activity, in clear contrast to Mr. Placencio, who attempted to hide his communications with the Union from management. An employee who is secretly supporting a union organizing effort is far more likely to feel coerced by repeated interrogation about such

[5] For other cases where "low-level" supervisors were found to have committed coercive interrogation, see, e.g., *MDI Commercial Servs.*, 325 NLRB 53, 69-70 (1997); *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994).

activities than one who openly supports the effort.[6]

The Employer's reliance on *Volair Contractors, Inc.* is similarly problematic. That case involved a supervisor who asked two employees why they were wearing union t-shirts, then made negative remarks about his experience with unions. While the Employer correctly notes that the Board did not find coercive interrogation, the facts of *Volair Contractors, Inc.* and the instant case could not be more different. Again, the targeted employees in *Volair Contractors, Inc.* were openly displaying their support for the union by wearing a t-shirt. Mr. Placencio, by contrast, was hiding his communications with the Union, and even lied to Mr. Harrison out of fear that revealing these communications would lead to retaliation. Importantly, the Board in *Volair Contractors, Inc.* supports its finding by noting that the supervisor's comments were "in direct response to [the employee's] demonstration of open union support by wearing the shirt." *See also Cardinal Home Products, Inc.*, 338 NLRB 1004, 1010 (2003) (no interrogation where a supervisor had a "friendly conversation" with an "open" union supporter). Once again, the Employer cannot find any Board decisions that actually support its conclusory allegations.

III. CONCLUSION

The Employer's exceptions to the ALJ's findings of fact and conclusions of law are not supported in the factual record or in NLRB precedent. Therefore, the Union asks that the Board dismiss these exceptions and sustain the ALJ's decision, at least as to the issues discussed herein.

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[6] Note, however, that even if Mr. Placencio was an "open" Union supporter, he could still be the victim of unlawful coercive interrogation. *See, e.g.*, *NLRB v. Brookwood Furniture*, 701 F.2d 452, 463 n.35 (5th Cir. 1983) (the mere fact that an employee "was a widely-known union adherent does not validate otherwise coercive interrogation[.]"); *Beverly California Corp. v. NLRB*, 227 F.3d 817. 835 (7th Cir. 2000), cert. denied 533 U.S. 950 (2001) ("Even open union adherents can be subjected to invalid coercive interrogation[.]").

Dated: April 29, 2020

WEINBERG, ROGER & ROSENFELD
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By: BRUCE A. HARLAND
WILLIAM T. HANLEY

Attorneys for Charging Party,
SERVICE EMPLOYEES INTERNATIONAL UNION-UNITED HEALTHCARE WORKERS WEST

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CERTIFICATE OF SERVICE

On April 29, 2020, I served the following documents in the manner described below:

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED HEALTHCARE WORKERS-WEST'S ANSWERING BRIEF IN RESPONSE TO DIGNITY HEALTH DBA MERCY GILBERT MEDICAL CENTER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

X (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from rfortier-bourne@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Via E-Gov, E-Filing

Roxanne L. Rothschild, Executive Secretary Office of the Executive Secretary National Labor Relations Board 1015 Half Street SE, Room 5100 Washington, DC 20570-0001

Via E-Mail

Judith E. Dávila
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
E-mail: judith.davila@nlrb.gov

Via E-Mail

Frederick C. Miner, Attorney at Law
Littler Mendelson, PC
Camelback Esplanade
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016
Email: fminer@littler.com

Via E-Mail

Mr. Cornele Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 N. Central Ave, Suite 1400
Phoenix, AZ 85004-3099
E-mail: cornele.overstreet@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 29, 2020, at Alameda, California.

Rhonda Fortier-Bourne

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